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13 Attorneys for Secured Creditor Boston Private Bank
14 & Trust Company, formerly known as and successor
15 to Borel Private Bank & Trust Company

16 UNITED STATES BANKRUPTCY COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA
19
20 SAN JOSE DIVISION

21 In re:

22 272 E. Santa Clara Grocery, LLC,
23 Debtor.

CASE NO. 13-53491
RS No.
CHAPTER 11

**DECLARATION OF DAVID SCHEIBER
IN SUPPORT OF SECURED CREDITOR
BOSTON PRIVATE BANK & TRUST
COMPANY'S MOTION FOR RELIEF
FROM STAY**

Hearing

Date: November 19, 2013
Time: 10:00 a.m.
Place: 280 S. First Street
San Jose, CA
Courtroom 3099
Judge: Hon. Stephen L. Johnson

24 I, David Scheiber, declare as follows:

25 1. I am a Senior Vice President – Special Assets Department of Secured Creditor
26 Boston Private Bank & Trust Company (“BPB”), successor in interest by merger to and formerly
27 known as Borel Private Bank & Trust Company. I have been assigned the responsibility for

1 administration and enforcement of the loan ("Loan") which is secured by the property now owned
2 by the debtor in this case. As part of my responsibilities, I have become familiar with the BPB's
3 loan documents for the Loan, its accounting of sums due and owing under the Loan, and the
4 supervision of the Loan by BPB personnel before me. Except as to those matters stated upon
5 information and belief, I have personal knowledge of the matters set forth in this declaration
6 based upon my personal review of BPB's business records, discussions with other BPB staff and
7 communications with the manager of the current owner of the property. If called upon to do so, I
8 could and would competently testify thereto.

9 2. I make this declaration in support of BPB's Motion for Relief from Stay relating to
10 the real property located at 272 East Santa Clara Street, San Jose, CA 95112 (Assessor's Parcel
11 No. 467-24-111) (the "Property").

12 3. BPB has never had a lending relationship with Debtor 272 E. Santa Clara Grocery,
13 LLC ("E. Santa Clara LLC"). BPB's borrower was and is an entity known as Kimomex Santa
14 Clara, LLC ("Kimomex").

15 4. On or about July 15, 2008, Kimomex executed and delivered to Borel a Business
16 Loan Agreement, a Promissory Note ("Promissory Note"), a first Deed of Trust ("Deed of
17 Trust"), an Assignment of Rents ("Assignment of Rents"), Non-Recourse Rider, Hazardous
18 Substances Certificate and Indemnity Agreement and other documents (collectively, the "Loan
19 Documents") in connection with the loan. True and correct copies of the Business Loan
20 Agreement, Promissory Note, Deed of Trust, Assignment of Rents, Non-Recourse Rider and
21 Hazardous Substances Certificate and Indemnity Agreement are attached hereto as **Exhibits A, B,**
22 **C, D, E and F**, respectively. Both the Deed of Trust and the Assignment of Rents were recorded
23 against the Property on July 18, 2008 in the Office of the Santa Clara County Recorder. Creditor
24 is the successor of Borel by merger and is now the lender, assignee and beneficiary under the
25 Loan Documents. BPB is the successor by merger of Borel and is now the lender, assignee and
26 beneficiary under the Loan Documents.

27 5. Pursuant to the terms of the Promissory Note and other Loan Documents,
28 Kimomex borrowed the maximum principal sum of \$3,600,000. At the time, Kimomex owned

1 the Property. The Property is now the Debtor's sole asset and the subject of this motion.

2 6. Later on or about May 14, 2009, Kimomex apparently also borrowed a sum of
3 about \$600,000 from a group of individuals and secured its obligation to those parties through a
4 junior deed of trust ("Junior Deed of Trust") against the Property. According to publicly
5 available records, that Junior Deed of Trust was recorded on or about May 21, 2009. A true and
6 correct copy of the Junior Deed of Trust obtained from the records of the County of Santa Clara is
7 attached hereto as **Exhibit G**. On information and belief, the trustee of the Junior Deed of Trust
8 later caused the Junior Deed of Trust to be foreclosed under its power of sale and sold to the
9 beneficiaries under the Junior Deed of Trust. The Trustee's Deed ("Trustee's Deed"), dated
10 October 27, 2011, was recorded on April 20, 2012. A true and correct copy of the Trustee's
11 Deed, obtained from the public records of the County of Santa Clara is attached hereto as **Exhibit**
12 **H**. The beneficiaries thereafter apparently conveyed all of their right, title and interest in the
13 Property to the Debtor, 272 E. Santa Clara Grocery, LLC ("Debtor") by Grant Deed ("Grant
14 Deed") recorded on or about April 20, 2012. A true and correct copy of the Grant Deed, obtained
15 from the records of the County of Santa Clara, is attached hereto as **Exhibit I**. Consequently, the
16 Debtor's interest in the Property is subordinate and subject to Creditor's Deed of Trust and
17 Assignment of Rents and all of Creditor's rights and remedies.

18 7. Kimomex breached its obligations to BPB under the Loan Documents when it
19 failed to make monthly payments when due beginning before mid-2011 and failed to pay all
20 property taxes for the Property when due. In addition, the conveyances of the Property under the
21 Junior Deed of Trust, under the Trustee's Deed and under the Grant Deed described in paragraph
22 6 above were all done without BPB's consent and therefore are in breach of the "due on sale"
23 covenant in the Deed of Trust.

24 8. BPB initiated foreclosure under the Deed of Trust in 2011. I am informed and
25 believe that about a week before the foreclosure sale, a representative of the Junior Lender
26 approached BPB and sought BPB's agreement to postpone the trustee's sale. By written
27 agreement, BPB agreed to postpone the sale from month to month for a period of time. By
28 written amendments, that time was extended but ended on December 31, 2012. BPB has had no

1 other agreements whatsoever with the Junior Lenders, their representative or the Debtor.

2 9. In their several agreements to postpone the BPB foreclosure sale the Junior
3 Lenders' representative and BPB expressly agreed that defaults under the loan were not cured and
4 that BPB reserved all of its rights and remedies with respect to the defaults, other than its
5 agreement to postpone the nonjudicial foreclosure sale from time to time on certain conditions. In
6 relevant parts, the parties expressly agreed:

7 "2. Remaining Default. The Parties acknowledge and agree that the
8 Payment [made by the Junior Lenders' representative] is insufficient in amount to
9 satisfy all obligations due and owing as of this time and that the Notice of Default
and Notice of Sale remain in full force and effect....

10 7. Reservation of [BPB] Enforcement Rights. The Parties acknowledge
11 and agree that by entering into this agreement, [BPB] is waiving none of its rights
12 and remedies under California law and its loan documents with respect to the
13 defaults of the borrower. Apart from its covenant to postpone the trustee's sale as
14 set forth expressly herein, [BPB] may at any time exercise any of its rights and
remedies as it deems appropriate in its sole discretion, including, without
limitation [BPB]'s right to seek appointment of a receiver with respect to the
property, [BPB]'s right under the civil code to provide notice to any tenant to pay
rent to [BPB] and [BPB]'s right to any other type of judicial relief it may deem
appropriate to protect its interests in the property or under the loan."

15 True and correct copies of the postponement agreements are attached
16 hereto as **Exhibits J-M**.

17 10. On June 27, 2013, Debtor filed a Chapter 11 Petition under the United States
18 Bankruptcy Code (the "Petition Date"). On June 27, 2013, Debtor filed a Chapter 11 Petition
19 under the United States Bankruptcy Code (the "Petition Date"). As of the Petition Date, BPB had
20 made no calculation of what it is owed under the "Interest After Default" provision of its
21 Promissory Note. As the result of later making calculation, we discovered that under the terms of
22 the Promissory Note, the Borrower had inadvertently been over-credited in reductions of principal
23 on applications of payments to principal and that the actual amount of principal owed is the sum
24 of \$3,555,168.55, plus interest and late fees of \$251,431.97.

25 11. We made this discovery following negotiations with the Debtor and after the
26 Debtor began disputing BPB's right to such interest in various pleadings it has filed, including its
27 proposed plan which it filed. The Debtor's assertions caused us to go back and make the
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1 calculation of interest after default under the loan documents. The following paragraphs explain
2 the proper calculation.

3 12. The Promissory Note provides that upon default, the interest rate shall
4 “immediately increase” by two per cent per annum. (Exh. B, p. 1) That means that the interest
5 rate under the Note increased automatically upon default from 6.50 percent per annum to 8.50
6 percent per annum. In this case, the first default was the violation of the due on sale/encumbrance
7 provision in the Deed of Trust which occurred in May 2009, when the Debtor’s principals and the
8 Kimomex violated the due on sale covenant in the Bank’s Deed of Trust by recording a second
9 deed of trust against the Property without the BPB’s consent. The problem of course was that this
10 default was not known to BPB until over two years later. Accordingly, BPB’s on-going
11 calculations of interest inadvertently remained at 6.5 percent when they should have increased to
12 8.5 percent.

13 13. The Debtor, of course, has now filed this case and began pressing us about what is
14 owed to BPB. The Debtor’s tactics therefore compelled us to review all of the post default
15 payments and how they should be applied under the provisions of the Promissory Note. Now that
16 we have found it necessary to make the interest after default calculations, we determined that the
17 outstanding amount of principal owing is actually higher than what we initially believed and what
18 we have previously stated in papers filed in this court. The reason for this difference is that more
19 of each payment made against the loan was inadvertently applied to principal than should have
20 been the case under the provisions of the Promissory Note. The Promissory Note requires that
21 payments should be applied first to any unpaid and accrued interest, then to principal, and then to
22 unpaid collection costs (the “Waterfall”). (Exh. B, p. 1). Accordingly, once the default occurred,
23 more of each subsequent payment should have been applied to interest because of the increased
24 interest due and then to principal. This means that BPB is due more principal than we previously
25 thought, and, by this declaration, I am correcting any prior statement about the principal due.

26 14. Attached hereto as **Exhibit N** is a schedule showing the proper application of
27 payments according to the “Waterfall” provision in the Promissory Note commencing with the
28 initial default in May 2009. Using the proper contractual allocation, the current outstanding

1 principal balance due and owing from Kimomex under the Promissory Note and other Loan
2 Documents is \$3,555,168.55. In addition, BPB is owed interest in the amount of \$217,401.61 as
3 of October 15, 2013, and late charges (5 percent of the “regularly scheduled payment”) of
4 \$34,030.36. The total amount owed as of October 15, 2013, is therefore \$3,806,600.52, plus
5 attorney’s fees and costs. Interest at the interest after default rate and attorney fees and costs
6 continue to accrue.

7 I declare under penalty of perjury under the laws of the State of California that the
8 foregoing is true and correct, and that this declaration was executed on October 22, 2013 at
9 Encino, California.

10 /s/ David Scheiber
11 David Scheiber
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